IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. KEYSPAN CORPORATION, Defendant.	Civil Action No.: 1:10-cv-01415-WHP Hon. William H. Pauley III

PLAINTIFF UNITED STATES'S RESPONSE TO PUBLIC COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. After careful consideration, the United States continues to believe that the relief sought in the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).[1]

The United States brought this lawsuit against Defendant KeySpan Corporation ("KeySpan") to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. On January 18, 2006, KeySpan entered into an agreement in the form of a financial derivative (the "KeySpan Swap") that essentially transferred to KeySpan, the largest supplier of electricity

[1] The United States and KeySpan will submit an amended proposed Final Judgment that takes account of the retention of jurisdiction concerns expressed by the Court with respect to Section IV of the proposed Final Judgment.

generating capacity in the New York City market, the capacity of its largest competitor. The KeySpan Swap ensured that KeySpan would withhold substantial output from the capacity market, a market that was created to ensure the supply of sufficient generation capacity for the millions of New York City consumers of electricity. The likely effect of this agreement was to increase capacity prices for the retail electricity suppliers that must purchase capacity and, in turn, to increase the prices consumers pay for electricity.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment (to be modified pursuant to the Court's direction, see, *supra*, n.1) and a Stipulation signed by the United States and KeySpan consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement ("CIS") in this Court on February 23, 2010; published the proposed Final Judgment and CIS in the *Federal Register* on March 4, 2010, *see United States v. KeySpan Corporation*, 75 Fed. Reg. 9946-01, 2010 WL 723203; and published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in *The Washington Post* for seven days beginning on March 10, 2010 and ending on March 16, 2010 and in *The New York Post* beginning on March 11, 2010 and ending on March 17, 2010. The 60-day period for public comments ended on May 16, 2010. The United States received seven comments, as described below, which are attached hereto.[2]

[2] To respond to the concerns raised by the submitted comments, this Response provides greater detail beyond the allegations in the Complaint.

I. BACKGROUND

A. The United States's Investigation of the Transaction

On November 21, 2006, the United States opened its investigation into the transaction at issue and its impact on the market. During the course of its extensive investigation, the United States received and considered over a million pages of documents and analyzed significant amounts of complex data, including bidding data from market participants. The United States issued Civil Investigative Demands to market participants and other entities with relevant information, interviewed market participants and the market's regulators, and conducted detailed economic analyses.

The United States considered the potential competitive effects of the KeySpan Swap in light of all relevant circumstances and concluded, as the Complaint alleges, that the KeySpan Swap was an anticompetitive agreement in violation of Section 1 of the Sherman Act.

B. The New York City Installed Capacity Market

In the state of New York, sellers of retail electricity must purchase a product from generators known as "capacity."[3] Electricity retailers are required to purchase capacity in an amount equal to their expected peak energy demand plus a share of reserve capacity. These payments for capacity assure that retail electric companies do not use more electricity than the system can deliver and encourage electric generating companies to build new facilities as needed. Because transmission constraints limit the amount of energy that can be imported into the New York City area from the power grid, the New York Independent System Operator

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[3] Except where noted otherwise, this description pertains to the market conditions that existed from May 2003 through March 2008.

("NYISO") requires retail providers of electricity to consumers in New York City to purchase 80% of their capacity from generators in that region. The New York City Installed Capacity ("NYC Capacity") Market constitutes a relevant geographic and product market.

The price for installed capacity in New York City has been set through auctions administered by the NYISO. The NYISO organizes the auctions to serve two distinct seasonal periods, summer (May though October) and winter (November through April). For each season, the NYISO conducts seasonal, monthly, and spot auctions in which capacity for New York City can be acquired for all or some of the seasonal period. Capacity suppliers offer price and quantity bids in each of these three auctions. Suppliers may bid all of their capacity at a single price or in separate increments of capacity at different prices. Supplier bids are "stacked" from lowest-priced to highest. The stack is then compared to the amount of demand. The offering price of the last bid in the "stack" needed to meet requisite demand establishes the market price for all capacity sold into that auction. Any capacity bid at higher than this price is unsold, as is any capacity bid at what becomes the market price not needed to meet demand.

The NYC Capacity Market was highly concentrated during the relevant period, with three firms – KeySpan, Astoria, and NRG Energy, Inc. – controlling a substantial portion of the market's generating capacity. These three firms were designated as "pivotal" suppliers by the Federal Energy Regulatory Commission ("FERC"), meaning that at least some of each of these three suppliers' output was required to satisfy demand. The three firms were subject to bid and price caps – Keyspan's being the highest – for nearly all of their generating capacity in New York City and were not allowed to sell their capacity outside of the NYISO auction process.

C. The Anticompetitive Agreement

As discussed more fully in the CIS, in the tight market conditions that existed from June 2003 through December 2005, almost all capacity in the New York City market was needed to meet demand, and KeySpan could sell nearly all of its capacity into the market even while bidding at its cap. KeySpan did so, and the market cleared at the price established by the cap, with only a small fraction of KeySpan's capacity remaining unsold.

Those tight conditions in the NYC Capacity Market were expected to end in 2006 due to the entry of approximately 1,000 MW of new generating capacity, with excess supply of capacity forecast to last into 2009. The increased supply meant KeySpan could no longer be confident that "bid the cap" would remain its most profitable strategy during the 2006-2009 period. While bidding the cap would keep market prices high, doing so also would entail withholding sales of substantially more capacity. The additional withholding could reduce KeySpan's revenues by as much as $90 million a year. Alternatively, KeySpan could compete with its rivals for sales by bidding more capacity at lower prices, which could potentially produce much higher returns for KeySpan than bidding the cap, but carried the risk that competitors would undercut its price and take sales away.

KeySpan contemplated acquiring Astoria's generating assets, which were for sale. The acquisition would have solved the problem that new entry posed for KeySpan's revenue stream, as Astoria's capacity would have provided KeySpan with sufficient additional revenues to make continuing to bid its cap its best strategy. KeySpan, however, soon concluded that the market power issues raised by an acquisition of its largest competitor would imperil the contemplated transaction.

Instead of purchasing the Astoria assets outright, KeySpan devised a plan to acquire a financial interest in Astoria's capacity. KeySpan would pay Astoria's owner a fixed revenue stream in return for the revenues generated from Astoria's capacity sales in the auctions. Rather than directly approach its competitor, KeySpan turned to a financial services company to act as the counterparty to the derivative agreement – the KeySpan Swap – recognizing that the financial services company would, and in fact did, enter an offsetting agreement with Astoria (the "Astoria Hedge").[4]

The KeySpan Swap remained in effect from May 1, 2006 through April 30, 2008. During that two year period, KeySpan earned approximately $49 million in net revenues under the Swap.[5]

D. The Anticompetitive Effect of the KeySpan Swap

The clear tendency of the KeySpan Swap was to alter KeySpan's bidding behavior in the NYC Capacity Market auctions. The KeySpan Swap effectively eliminated KeySpan's incentive to compete for sales by lowering price. As a result, KeySpan bid its cap, causing capacity

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[4] Although KeySpan knew about Astoria's role in the transaction, the financial services company did not inform Astoria about KeySpan. It appears that Astoria believed that the financial services company had found a counter-party other than a competing supplier of capacity to offset the financial services company's market risk from the Astoria Hedge.

[5] The New York Public Service Commission ("NYPSC") estimated KeySpan's net revenues under the KeySpan Swap at $67.8 million for the period May 2006 through March 2008. *See* NYPSC Comment, Paynter Affidavit at ¶ 15. The estimate, however, fails to reflect the fact that the terms of the KeySpan Swap imposed a ceiling on the spot auction clearing price used to determine revenues under the Swap. This ceiling is based on the average of the bid caps for KeySpan, Astoria and NRG. Using this ceiling for the appropriate months, KeySpan's net Swap revenues were approximately $61.2 million for the May 2006 through March 2008 period. The NYPSC estimate also fails to include the last month of the Swap (April 2008) in which KeySpan had to pay out approximately $12.2 million.

market prices to clear at a level higher than likely would have occurred absent the agreement.

1. Likely Bidding Scenarios Absent The KeySpan Swap

Absent the Swap, KeySpan likely would have chosen from a range of potentially profitable competitive strategies in response to the entry of new capacity and, had it done so, the price of capacity likely would have declined. Although one cannot confidently predict the price level that would have occurred but for the Swap, it is likely that oligopoly pricing in this highly concentrated market would have been the outcome; *i.e.*, prices would have fallen below the cap levels but would have remained above levels that would have prevailed under perfect competition.[6]

In considering how to bid when the new capacity entered the market, the key suppliers – KeySpan, Astoria and NRG (each of which would have remained pivotal) – would have sought to mitigate the risk of lost sales that could occur if they bid too high and their capacity was not taken (*i.e.*, volume risk) and the risk of low price from competitive bidding (*i.e.*, price risk). To protect against these risks, these suppliers likely would have bid increments of capacity at different price levels ("tiered bids") rather than bid all of their capacity at a single price. The strategic tiering of bids at relatively high prices would have made sense for these suppliers because it would have preserved the possibility of obtaining the rewards of discounting (selling a

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[6] The New York City Economic Development Corporation ("NYCEDC") comments cite an affidavit submitted in a FERC proceeding by the NYISO market monitor, David Patton, for the proposition that, had all capacity been sold, prices would have cleared under $6/kW-month, which is less than half the level of the pivotal suppliers' caps (which were above $12/kW-month). NYCEDC Comments at 9; *see also* AARP Comments at 11. Dr. Patton described the effect all suppliers would have had on the auction if bidding as "price-takers" (*i.e.*, a "perfectly competitive" outcome), but he does not opine that suppliers actually would have bid in this manner absent the Swap.

greater volume of capacity) while simultaneously mitigating the price risk of discounting.

The United States believes that, absent the KeySpan Swap, KeySpan and the other pivotal suppliers would have engaged in tiered bidding upon the entry of new generation capacity in 2006.[7] In other words, in the but-for world, tiered bidding strategies at prices lower than the cap would have been compelling for KeySpan and the other pivotal suppliers because they offered significant upside, and these suppliers would have been able to structure their tiered bids to limit their downside risk relative to bidding their caps. As a result, market prices likely would have cleared at a level below the cap but above competitive levels.[8] This view is consistent with the pattern observed during prior periods of excess capacity, when prices did not fall to perfectly competitive levels.

2. With the KeySpan Swap In Place, KeySpan Bid Its Cap

With the Swap, capacity prices remained high. By providing KeySpan with revenues from Astoria's capacity in addition to KeySpan's own revenues, the Swap made bidding the cap

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[7] If all the pivotal suppliers used tiered bidding, it is more likely, at any given clearing price, that withholding would be shared (*i.e.*, that each would lose some sales) rather than one supplier taking on the high cost of being the sole withholder of capacity and losing the greatest share of sales.

[8] NYCEDC claims that the effect of the Swap was to "more than doubl[e] what would otherwise be the market clearing price" and that, absent the Swap, prices would have fallen to competitive levels. NYCEDC Comment at 9-10. In an attempt to show that prices but for the Swap would have fallen dramatically to levels consistent with perfect competition, NYCEDC compares prices for specific auction periods during certain years the Swap was in effect to those same auction periods after the Swap's expiration in April 2008. *See id.* (*e.g.*, $12.34/kW-month price in May 2007 compared to $6.52/kW-month in May 2008). These comparisons, however, are flawed because FERC changed the rules for the auction in May 2008, requiring, among other things, that the pivotal suppliers bid *zero*, as would a "price taker," thereby causing prices to fall to the competitive floor. Given this significant rule change, these comparisons cannot serve as a meaningful test for how the auctions would have cleared had KeySpan, Astoria, and NRG been free, as they had been in the past, to engage in strategic, tiered bidding strategies.

KeySpan's most profitable strategy regardless of its rivals' bids. Following entry of the substantial amount of new capacity into the market in 2006, KeySpan continued to bid its cap even though a significant portion of its capacity went unsold. In contrast to the historic pattern following significant supply increases, the market price of capacity did not decline.

E. The Proposed Remedy

The proposed Final Judgment requires KeySpan to disgorge profits gained as a result of its unlawful agreement in restraint of trade. KeySpan is to surrender $12 million to the Treasury of the United States.

II. SUMMARY OF COMMENTS

A. The Pennsylvania Public Utility Commission (PaPUC)

The PaPUC stated it was deeply concerned with the "existence of a sophisticated multi-year effort by the defendant to evade competition" and the impact of the defendant's conduct on electricity markets and electricity prices. The PaPUC expressed its appreciation to the Department of Justice for bringing this enforcement action, stating that it does not oppose the proposed Final Judgment and explaining that this enforcement action demonstrates that conduct in electricity markets that is "inimical to competition . . . may result in prosecution and serious consequences under the antitrust laws." The PaPUC concluded by noting that "the PaPUC and other public and private entities with a critical stake in the success of wholesale electric generation competition have benefitted from studying the facts of this case and will be better able to detect and deter similar schemes in the future."

B. New York State Consumer Protection Board (NYSCPB)

The NYSCPB commended the Department of Justice for pursuing the improper collusive

behavior at issue. NYSCPB expressed two concerns with the settlement. First, it argued that the United States has a burden to provide sufficient evidence for the court to determine the total harm from the wrongful behavior, explain how the amount to be disgorged will deter future wrongdoing, and identify the responsible officers. Second, it argued that the proposed Final Judgment is not in the public interest because the disgorgement proceeds are remitted to the Treasury rather than to the harmed electricity customers and concluded that the proposed Final Judgment should contain a mechanism to distribute the proceeds to customers or establish an energy efficiency program.

C. New York City Economic Development Corporation (NYCEDC)

The NYCEDC was "highly appreciative" of the enforcement effort and commended using antitrust remedies to address anticompetitive practices in the New York City energy sector. The NYCEDC criticized the $12 million disgorgement as inadequate "given the scale of unjust enrichment to KeySpan." It asserted that there are "professional estimates" and other evidence of the harm that the Court should use to review the adequacy of the remedy, including a KeySpan statement of the amount it made under the Swap and various independent estimates of capacity prices if KeySpan had not entered the Swap.

D. New York State Public Service Commission (NYPSC)

NYPSC stated that the Department of Justice "is to be commended for its faithful enforcement of the antitrust laws to protect the integrity of the electricity markets in New York City." It argued, however, that the Court has no basis for evaluating whether the proposed disgorgement will prevent KeySpan's unjust enrichment or whether it is sufficient to deter anticompetitive conduct in the future. It recommended that the Court order additional evidence

to be produced and asserted that "anything less than full disgorgement" would be inadequate for deterrence.

NYPSC also asserted that because "ratepayers may have no recourse" due to the filed rate doctrine, the remedy in the United States's case should reflect the "standard measure of damages," which is the amount of the "overcharge" in the capacity market. It concluded that payment to the U.S. Treasury instead of to consumers "would be a manifestly unfair result" and that the disgorged proceeds should either be credited to ratepayers or used to establish an energy efficiency program.

E. Consolidated Edison (Con Ed)

Con Ed argued that the settlement is not in the public interest because it fails to provide payment to electricity consumers despite the United States's recognition that "private individuals could not bring an antitrust suit here due to the barrier of the filed rate doctrine." It argued that the filed rate doctrine should have no application to the equitable distribution of disgorged funds to consumers as a remedy in this case.

F. AARP

AARP asserted that the settlement is not in the public interest because of the "lack of any monetary remedy or other discernible benefit for injured consumers, and the absence of a credible deterrent." It claimed that there is an inadequate factual foundation to determine the appropriateness of the amount of the remedy and its deterrent effect. It further noted that the decree contains no admission of guilt by KeySpan and no "public shaming."

AARP requested that the proposed Final Judgment be amended to require an acknowledgment of wrongdoing, identification of total "inflated prices" for capacity,

identification of the derivative contracts at issue, and disgorgement of all profits. In the alternative, AARP argued that the record should be augmented to show the total profit "achieved by all sellers in the NYISO capacity market," an estimate of the "total damage and economic harm" to consumers in the entire state of New York, the revenues KeySpan received under the Swap, and the rationale for accepting less than full disgorgement and for not providing any remedy to benefit injured customers.

G. Nelson M. Stewart

Mr. Stewart urged the United States not to "accept a plea" from KeySpan. He alleged that KeySpan and related entities committed fraud, perjury, and forgery with respect to construction contracts wholly unrelated to the capacity market or the Swap.

III. STANDARDS GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION UNDER THE TUNNEYACT

As discussed in detail in the Competitive Impact Statement, the Court, in making the public interest determination called for by the Tunney Act, is required to consider certain factors relating to the competitive impact of the judgment and whether it adequately remedies the harm alleged in the complaint. *See* 15 U.S.C. § 16(e)(1)(A) & (B) (listing factors to be considered).

This public interest inquiry is necessarily a limited one, as the United States is entitled to deference in crafting its antitrust settlements, especially with respect to the scope of its complaint and the adequacy of its remedy. *See generally United States v. Microsoft Corp*., 56 F.3d 1448, 1458-62 (D.C. Cir. 1995); *United States v. SBC Commc'ns*, 489 F. Supp. 2d 1, 12-17 (D.D.C. 2007). Although the Tunney Act was designed to prevent "judicial rubberstamping" of proposed Unites States consent decrees, the "Court's function is not to determine whether the proposed [d]ecree results in the balance of rights and liabilities that is the one that will *best* serve society,

but only to ensure that the resulting settlement is 'within the *reaches* of the public interest.'" *United States v. Alex Brown & Sons*, 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (*quoting Microsoft*, 56 F.3d at 1460) (emphasis in original), *aff'd sub nom*, *United States v. Bleznak*, 153 F.3d 16 (2d Cir. 1998).

With respect to the scope of the complaint, the Tunney Act review does not provide for an examination of possible competitive harms the United States did not allege. *See, e.g., Microsoft*, 56 F.3d at 1459 (holding that the district judge may not reach beyond the complaint to evaluate claims that the government did not make).

With respect to the sufficiency of the proposed remedy, a district court should accord due respect to the United States's views of the nature of the case, its perception of the market structure, and its predictions as to the effect of proposed remedies. *See, e.g.*, *SBC*, 489 F. Supp. 2d at 17 (United States entitled to deference as to predictions about the efficacy of its remedies). Under this standard, the United States need not show that a settlement will perfectly remedy the alleged antitrust harm; rather, it need only provide a factual basis for concluding that the settlement is a reasonably adequate remedy for the alleged harm. *Id.*[9]

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[9] Tunney Act review is not so that the court can engage in an "unrestricted evaluation of what relief would best serve the public," *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)), or determine the relief "that will best serve society," *Bechtel*, 648 F.2d at 666, but simply for the court to determine whether the proposed decree is within the reaches of the public interest – "even if it falls short of the remedy the court would impose on its own." *United States v. AT&T Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982).

IV. RESPONSE TO THE NEW YORK COMMENTORS AND AARP

Disgorgement serves the public interest by depriving KeySpan of ill-gotten gains, thereby deterring KeySpan and others from engaging in similar anticompetitive conduct in the future. No other remedy would be as effective to fulfill the remedial goals of the Sherman Act to "prevent and restrain" antitrust violations.[10] Given that the KeySpan Swap has now expired and KeySpan no longer owns the generating assets associated with the anticompetitive conduct, injunctive relief against KeySpan would not be meaningful.[11]

The comments of the New York Public Service Commission, the New York State Consumer Protection Board, the New York City Economic Development Corporation, and Consolidated Edison Company (collectively the "New York Commentors") and AARP have two central objections: (1) that the $12 million dollar disgorgement is inadequate to serve its remedial purpose, and (2) that the disgorged proceeds, rather than being remitted to the Treasury, should directly or indirectly benefit electricity consumers who paid higher electricity bills or be used to fund programs that benefit electricity consumers. The United States has carefully considered these objections but finds that they do not warrant modification of the proposed Final Judgment.

A. The Proposed Remedy Is Appropriate And Deters Anticompetitive Conduct

The New York Commentors argue that disgorgement of $12 million is an inadequate remedy that will not serve as an effective deterrent, especially when compared to KeySpan's

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[10] 15 U.S.C. § 4 (investing district courts with equitable jurisdiction to "prevent and restrain" violations of the antitrust laws).

[11] The disgorgement here seeks to prevent anticompetitive conduct and, in this way, is similar in focus to the traditional antitrust remedy of injunctive relief.

approximately $49 million net revenues earned under the Swap and the increased prices paid by electricity consumers. Such concerns are misplaced.

Disgorgement in and of itself constitutes significant and meaningful relief. This is the first time that the United States has sought disgorgement under the Sherman Act. Parties contemplating anticompetitive agreements similar to the KeySpan Swap now will have to take into account possible disgorgement, thereby directly affecting their incentives to engage in illegal behavior. Disgorgement is particularly appropriate here as the anticompetitive conduct at issue may not be subject to other remedies. For example, absent disgorgement, KeySpan likely would retain all the benefits of its anticompetitive conduct because the the filed rate doctrine creates significant obstacles to the collection of damages.[12]

Had the case proceeded to trial, the United States would have sought disgorgement of the approximately $49 million in net revenues that KeySpan received under the Swap,[13] contending that these net revenues reflected the value that KeySpan received from trading the uncertainty of competing for the certainty of the bid-the-cap strategy. The United States recognizes that it has not proved its case at trial and that "a court considering a proposed settlement does not have

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[12] *See Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922); *see also*, *infra*, § IV.B.

[13] The NYPSC suggests that the disgorgement calculation should also include the "profits gained by KeySpan through the unlawfully higher price of capacity." NYPSC Comments at 14 & n.5. The NYPSC appears to be contending that, for example, if KeySpan sold 1600 MW at its cap of approximately $12/kW-month under its anticompetitive Swap strategy but would have sold 2400 MW at a lower price (assume $8/kW-month), then KeySpan gained an additional profit of $6.4 million (1600 MW × $4/kW-month). This contention is misplaced, as it fails to account for revenues from the additional volume that KeySpan would have sold at the lower clearing price and thereby ignores the net auction revenues that KeySpan would have earned in the but-for world.

actual findings that the defendant[] engaged in illegal practices, as would exist after a trial."[14] The $12 million disgorgement amount is the product of settlement and accounts for litigation risk and costs. As courts have stressed, it is altogether appropriate to consider litigation risk and the context of settlement when evaluating whether a proposed remedy is in the public interest.[15]

Commentors nevertheless assert that anything less than full disgorgement is inadequate as it would not deter the conduct at issue. This position ignores the fact that the loss to KeySpan of $12 million in Swap revenues would have had a deterrent effect on KeySpan's incentive to enter into the Swap. The United States contends that the Swap removed any incentive for KeySpan to bid competitively, locking it into bidding its cap instead of evaluating competitive choices, each of which could have resulted in different market clearing prices for capacity.[16] The violation was based on the anticompetitive effect of the agreement on KeySpan's incentives to compete, not on a specific lower price that would have resulted absent the Swap.[17] In evaluating whether to pursue an anticompetitive Swap, KeySpan would have engaged in a cost-benefit analysis weighing the returns from the anticompetitive strategy against the returns of various potential competitive bidding strategies. While we cannot quantify with certainty KeySpan's bid levels or the outcome of the market clearing price that would have resulted but for the Swap,

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[14] *SBC*, 489 F. Supp. 2d at 15 (citing *Microsoft*, 56 F.3d at 1461).

[15] "It is therefore inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial. Remedies which appear less than vigorous may well reflect an underlying weakness in the government's case, and for the district judge to assume that the allegations have been formally made out is quite unwarranted." *Microsoft*, 56 F.3d at 1461; *see also SBC*, 489 F. Supp. 2d at 15 ("[R]oom must be made for the government to grant concessions in the negotiation process for settlements.").

[16] *See* Complaint, ¶¶ 4-5.

[17] *See* CIS at 6-7.

depriving KeySpan of $12 million in Swap revenues would have reduced the value to KeySpan of engaging in the anticompetitive Swap strategy, thereby shifting the results of KeySpan's cost-benefit analysis toward competitive strategies rather than entering into the Swap.[18]

Moreover, it is improper to consider the adequacy of the disgorgement amount by comparing $12 million to some measure of overcharges to consumers in the electricity market. Disgorgement is not aimed at making consumers whole. As this Court has previously recognized, the purpose of disgorgement is to deprive the violator of unjust enrichment rather than to compensate victims of the violation.[19] The extent of market harm is not relevant, as once a violation has been established, a district court "possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged by [the violation]."[20] Such an inquiry would require the Court to assess the price of capacity that would have prevailed absent the Swap,[21] a problematic exercise given the

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[18] KeySpan would have had two revenue streams to consider when deciding upon a bidding strategy: revenues directly from sales of capacity in the auctions and revenues from the Swap. It is likely that KeySpan absent the Swap would have earned more in *auction* revenues from tiered bidding strategies than from bidding its cap. Indeed, if this were not the case, the Swap would not have altered how KeySpan bid. KeySpan earned more *total* revenues by bidding its cap when accounting for earnings it receives with the Swap in effect. The disgorgement remedy here serves to reduce the additional earnings the Swap would have provided KeySpan.

[19] *SEC v. Bear, Stearns & Co.,* Inc., 626 F. Supp. 2d 402, 406 (S.D.N.Y. 2009).

[20] *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985). *See also SEC v. Tome,* 833 F.2d 1086, 1096 (2d Cir. 1987) ("Whether or not [any victims] may be entitled to money damages is immaterial [to disgorgement].")

[21] Such an assessment is disfavored under the filed rate doctrine in cases where private claimants seek damages for overcharges. *See, eg. Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 580-81 (1981) ("In the case before us, the Louisiana Supreme Court's award of damages to respondents was necessarily supported by an assumption that the [different] rate respondents might have filed with the [regulator] was reasonable. Otherwise, there would have

uncertainty of determining market outcomes absent the Swap.[22]

B. Disgorgement Proceeds Should Be Remitted To The U.S. Treasury

Several commentors argued that KeySpan's $12 million disgorgement payment should be made to entities other than the U.S. Treasury in order to benefit the electricity customers in New York City who paid higher prices as a result of KeySpan's conduct. The United States shares the commentors' concern for the New York City ratepayers and, indeed, brought this case and sought disgorgement in order to deter future anticompetitive agreements like the KeySpan Swap. The United States has carefully considered the suggested alternative uses for the disgorgement proceeds but has determined that payment to the U.S. Treasury is the most appropriate result in this circumstance. The alternative distribution plans proposed by commentors seek, in effect, to restore funds to ratepayers. The United States, however, specifically chose to seek disgorgement, rather than restitution, as a remedy for this violation. As discussed in the CIS, disgorgement is particularly appropriate on the facts of this case to fulfill the remedial goals of the Sherman Act.[23] Disgorgement also provides finality, certainty, avoidance of transaction costs, and potential to do the most good for the most people.[24]

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been no basis for that court's conclusion . . . that the [regulator] would have approved the rate. But under the filed rate doctrine, the [regulator] alone is empowered to make that judgment, and until it has done so, no rate other than the one on file may be charged.").

[22] Given the difficulty of definitively estimating the harm to the market and its irrelevance to the questions relating to the adequacy of the disgorgement remedy, the United States has no obligation, as AARP asserts, to provide estimates of total economic harm and profits received by all market participants resulting from the alleged violation.

[23] CIS at 9-10.

[24] *See Bear Stearns*, 626 F. Supp. 2d at 419 (directing the transfer of remaining disgorgement-related settlement funds to the Treasury to be used by the Government for its operations).

Legal concerns would arise with a remedy based on restitution that sought to directly or indirectly reimburse New York City ratepayers. Such a remedy would raise questions relating to the filed rate doctrine, which bars remedies (such as damages) that result, in effect, in payment by customers and receipt by sellers of a rate different from that on file for the regulated service.[25] Some of the commentors recognize the doctrine's potential limitation on their own ability to seek such reimbursement directly. They do not discuss the fact that regulators such as the FERC and the NYPSC seeking to offer refunds may also be constrained by the doctrine and its corollary bar to retroactive ratemaking.[26] The mechanisms suggested by the commentors could be seen as an end run around those well-established doctrines. In this case, payment to the U.S. Treasury avoids this unnecessary and thorny issue.

Moreover, the Miscellaneous Receipts Act ("MRA") states that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). Under this statute, members of the Executive Branch[27] that receive money for the United States are to remit such funds directly to the U.S. Treasury. A purpose of the statute is to

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[25] *See generally Square D Co. v. Niagara Frontier*, 476 U.S. 409, 423 (1986).

[26] *See, e.g.*, *Arkla*, 453 U.S. at 578 ("Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively. . . . This rule bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.'"(citations omitted)). Con Ed – a commentor here – directly requested that FERC order refunds of the higher cost of capacity due to KeySpan's behavior. The FERC declined to grant them. *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 (2008) (March 7, 2008 Order).

[27] The MRA applies to the Department of Justice as a member of the Executive Branch. We are not aware of its application to independent agencies such as the Securities and Exchange Commission.

protect Congress's appropriations authority by ensuring that money collected from various sources cannot be used for programs not authorized by law. The proposed remedy avoids any issues of compliance with the MRA.[28]

V. RESPONSE TO COMMENTS OF NELSON M. STEWART

Mr. Stewart's comment alleges fraud, perjury, and forgery committed by KeySpan and its subsidiary KSI Contracting. The allegations concern conduct that is wholly unrelated to the capacity market or the KeySpan Swap and are unrelated to the antitrust violations that the United States alleges in its Complaint. As noted above, in making its public interest determination in accordance with the Tunney Act, it would be "error for the judge to inquire into allegations outside the complaint." *Microsoft*, 56 F.3d at 1463. These Tunney Act proceedings, therefore, are not an appropriate venue for the consideration of Mr. Stewart's claims.

VI. CONCLUSION

After careful consideration of the public comments, the United States remains of the view that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint and that its entry would therefore be in the public interest. Plaintiff's chosen remedy in this case deprives KeySpan of ill-gotten gains, effectively deters the harmful behavior, and establishes the United States's willingness to seek disgorgement in appropriate cases. The PaPUC (as well as other commentors) noted that the action has

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[28] In addition to legal concerns, distribution of the disgorged funds to entities other than the Treasury also would raise practical concerns. Distribution directly to the numerous individual electricity consumers would have high administrative costs relative to the overall disgorgement amount. Distribution to the electricity companies that purchased capacity from generators for ultimate refund to consumers could involve monitoring and compliance issues. And, the funding of an energy efficiency program would also raise administrative issues (and would be attenuated from the harm alleged in the Complaint).

established an important antitrust enforcement precedent in regulated energy markets and that, as a result, it and other public and private entities with a critical stake in the success of wholesale electric generation competition will be better able to detect and deter similar schemes in the future.[29] Based on the factors set forth in the Tunney Act, entry of the proposed Final Judgment is in the public interest.

Pursuant to Section 16(d) of the Tunney Act, the United States is submitting the public comments and this Response to the Federal Register for publication. This Response is also being

[29] *E.g.*, PaPUC Comments at 3.

provided to each of the commentors. After the comments and this Response are published in the Federal Register, the United States will move this Court to enter the proposed Final Judgment.

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Respectfully submitted,

/s/

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